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CRUCIAL ISSUES IN LABOR LITIGATION.

III.

HAVING stated[1] general propositions as to the requisites for justification, it is now proposed to apply these tests to some hypothetical cases. But it should be premised that the views now to be expressed must to some extent represent simply the ideas of the individual writer rather than a consensus of judicial opinion. Some cases, which might well have turned on the question of justification, have gone off on other issues; and hence there has been less discussion of justification than might have been expected.[2] In the scarcity of direct authority as to some situations, one cannot feel sure that each of the particular problems has been correctly solved. It may, however, be possible to indicate the lines on which these problems must be worked out.[3]

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[1] *Ante*, p. 361.

[2] As to possible justification, or necessity to justify, in case of an employer's threat to discharge his employees if they trade with plaintiff, see 18 HARV. L. REV. 417, 418; and *cf.* 44 Am. L. Reg. (N. S.) 481–484.

[3] These hypothetical cases are, of course, discussed on the assumption that the general views previously stated as to *primâ facie* liability are correct, although we do not stop in each case to point out exactly how these views specially apply to that particular case.

Some readers who believe that the defendant should be exonerated in various hypothetical cases where we think him liable, may base their conclusion on the ground that the defendant's conduct needs no justification. Disagreeing with the views previously expressed in this article as to *primâ facie* liability, they think that in certain cases there is no call upon the defendant to justify his conduct. In some of these instances, if they had thought that the defendant's conduct was *primâ facie* actionable, they might possibly have held the attempted justification insufficient.

Case 1. A has only one vacancy among his employees. B applies for the place. Immediately after, defendant applies for it and obtains it. Defendant knew that his application, if successful, would prevent B's obtaining employment from A. B sues defendant.

Here defendant is justified. He has an equal right with B to be a candidate for the single place.[1] The question whether defendant's justification would be destroyed by proof that his predominant motive was ill will to B is one seldom likely to arise. For reasons elsewhere given, we think that such bad motive would not rebut the otherwise sufficient justification.

Case 2. B is working for A under a contract terminable, at any moment, at the will of either party. Defendant, who is working for A under a similar contract, tells A that he will quit A's employ unless A ceases to further employ B. A thereupon ceases to employ B. A has room for both B and defendant in his business. Defendant's sole reason for the notice is his personal dislike of B. He has no objection to B's character or habits. B sues defendant.[2]

We think that the desire of gratifying defendant's capricious dislike of B does not justify thus intentionally inducing A to take action damaging to B. It is true that Lord Watson, in Allen *v.* Flood,[3] said: "It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work." But it is submitted that while the right to simply abstain from work may be "absolute," yet this "right" (or a threat to exercise it) cannot be used affirmatively as a lever to induce a third person to take action damaging to the plaintiff. "No one can legally interfere with the employment of another, unless in the exercise of some right of his own which the law respects. His will so to interfere for his own gratification is not such a right."[4]

Case 3. B, a non-union journeyman printer, is working in A's printing office under a contract terminable, at any moment, at the will of either party. Defendant, a union journeyman printer who is working for A under a similar contract, tells A that he will quit A's employ unless A ceases to further

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[1] See Knowlton, C. J., in Berry *v.* Donovan, 188 Mass. 353, 357; Loring, J., in Pickett *v.* Walsh, 78 N. E. Rep. 753 (Mass.).

[2] The question would be the same in principle if defendant had offered to begin working for A on condition of A's ceasing to employ B.

[3] [1898] A. C. 1, 98.

[4] Knowlton, C. J., in Berry *v.* Donovan, 188 Mass. 353, 357.

employ B.[1] A thereupon ceases to employ B. A has room for both B and defendant in his business. Defendant has no personal ill will towards B. His reason is a desire to strengthen the principle of unionism in his own trade. B sues defendant.[2]

If a combination is regarded as unlawful *per se*, or as unlawful when there is a purpose to create a monopoly in labor, the justification here would be held bad. But if we reject these views, it does not necessarily follow that the justification must be held good.

The question then arising may be stated as follows: Are the defendants liable because the probable advantage to them is not sufficiently direct, or not sufficiently great, to justify them in inflicting this direct damage on the plaintiff or the indirect damage to the employer or to the community?

On this question the authorities are not unanimous.

The view that the justification is insufficient is supported by the courts of Massachusetts, Maryland, and Pennsylvania, and also by Mr. Justice William O'Brien and Mr. Eddy.[3]

It is urged that, to constitute a justification, the raising of wages or lessening of hours must be the direct and immediate result. Hammond, J., in Plant *v.* Woods, says:

"The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the

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[1] Suppose that unionist journeymen in a machine shop, not content with monopolizing the journeymen's positions, threaten to leave unless a non-union foreman is dropped and a union foreman designated by themselves is substituted. If there is held to be a justification in Case 3, does this compel the conclusion that the above conduct as to the foreman is also justified? We think not. The exclusion of a non-union foreman, while it may be beneficial to the union, is not as necessary to its existence as the exclusion of non-union journeymen. Nor is the foreman a rival or competitor of the journeyman. We have stated it as one of the requisites to justification (*ante*, p. 361) that the damage resulting to the plaintiff or to the general public (including the employer) must not be excessive in proportion to the benefit to the defendant. It is evident that the damage to the employer must be much greater than if the unionization of the shop is confined to the journeymen. Indeed it is difficult to see where the harm would stop. The next claim might be for the union to select the general superintendent; and next to exclude the employer altogether from personal supervision, or indeed exclude him from entering his own workshop.

[2] The question can be varied by supposing B to be a member of a rival union.

[3] Plant *v.* Woods, 176 Mass. 492; Berry *v.* Donovan, 188 Mass. 353; Erdman *v.* Mitchell, 207 Pa. St. 79; Lucke *v.* Clothing C. & T. Assembly, 77 Md. 396; William O'Brien, J., in Leathem *v.* Craig, Ireland [1899] 2 Q. B. & Ex. D. 667, 698; 1 Eddy, Combinations, 416. *Cf.* Erle, Trade Unions, 73, 74.

right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition."[1]

The contrary view is forcibly stated in the dissenting opinion of Holmes, C. J., in Plant *v.* Woods:

"To come directly to the point, the issue is narrowed to the question whether, assuming that some circumstances would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendant's society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contests of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."[2]

The result reached by a majority of the New York Court of Appeals in National Protective Association *v.* Cumming[3] is like that of Judge Holmes; but Professor Lewis points out a radical difference in the reasons given.[4]

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[1] 176 Mass. 492, 502. And see Knowlton, C. J., in Berry *v.* Donovan, 188 Mass. 353, 359.

We are here discussing Case 3 upon the supposition (*ante*, pp. 358, 253) that such a movement against the employment of non-unionists can be, and is, carried on without resorting to the unlawful method of using or threatening force, either against the persons of the non-unionists or the property of the employer. But it may be contended that this supposition hardly ever accords with the actual fact; that a movement of this sort, supported as it generally is by bitter denunciation of the non-unionist, is certain to result in the use or threat of violence by a part of the unionists; and that the remainder of the unionists will make no effectual effort to restrain their fellows. In the majority opinion in Plant *v.* Woods, *supra*, 496, 497, Judge Hammond assumes that such results are always to be expected. If it is practically impossible to carry out such a movement peacefully, then it may be urged that the law should not permit the movement to be undertaken, and that hence the attempted justification in the present case should be held bad.

As to the special reasons for expecting a resort to violence in a labor contest of this particular kind, see Professor Bullock in 94 Atl. Monthly 438.

[2] 176 Mass. 492, 505. "To Trade Unionists Non-Unionists are permanent rivals; acting in their own interests, they undersell them in the labor market, take the side of the employer against the Unionists in time of strike, and if the strike is successful seek to share the fruits obtained by the sacrifices of the Unionists." Sir Godfrey Lushington, Report of Royal Commission, 90.

See the discussion in Mitchell, Organized Labor, c. 32: "The Unionist and the Non-Unionist."

[3] 170 N. Y. 315.

[4] 44 Am. L. Reg. (N. S.) 496.

In the decision of Allen *v.* Flood, in the House of Lords, the majority of the Law Lords held that there was not even a *primâ facie* tort, and hence they had no occasion to decide what would constitute a justification. But, if that question had been considered material, we should infer that some, at least, of the majority Lords would have taken the same view as Judge Holmes. The opinion of one of the ablest of the majority, Lord Herschell, leaves little doubt as to his concurrence.[1]

The question has repeatedly arisen in mercantile transactions whether it is unfair competition for a trader (or a combination of traders) to insist that those who deal with him shall not deal with his rivals as to the subject-matter of rivalry. Here again the authorities are not unanimous, but there is more tendency to sustain the justification, and the authorities which sustain such conduct in mercantile transactions may fairly be cited to justify the conduct of labor unionists in the case now under consideration. Professor Bullock says:[2] "To refuse to sell sugar or tobacco to a dealer who will not agree to buy from no other source is precisely like the refusal of laborers to work for a person who will not buy all his labor from the trade-union."[3] Some of the cases[4] will be referred to in connection with the discussion of Temperton *v.* Russell under Case 11.[5]

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[1] [1898] A. C. 1, 141. See also Lord Shand, p. 167.

[2] 94 Atl. Monthly 436.

[3] The theory that there is a perfect analogy between the cases of mercantile competitors and labor competitors seems inconsistent with the decision in Cleland *v.* Anderson, 66 Neb. 252. The statute there under consideration punished any combination of dealers intended "to prevent others from conducting or carrying on the same business," or which tended "to prevent or preclude a free and unrestricted competition among themselves or others or the public generally." Section 9 of this statute expressly excepted from its operation organizations of laboring men for the purpose of raising wages. It was held that this exception did not make the statute unconstitutional. We think this decision erroneous (*ante*, p. 353), and it is admitted to be in direct conflict with Ins. Co. *v.* Cornell, 110 Fed. Rep. 816, 825. But if the Nebraska decision is sustained, the labor unions can no longer rely on the supposed analogy in support of their demand (see *post*, under Case 11) that the common law should allow the laborer the same methods of economic warfare which it allows to the trader; they cannot take inconsistent positions, according to their varying interest. They cannot deny the analogy when the constitutionality of the Nebraska statute is in controversy, and then insist on the existence of the analogy in order to enjoy certain competitive rights at common law.

[4] See authorities collected by Professor Wyman, 17 Green Bag 200, 222; also 18 HARV. L. REV. 446; 44 Am. L. Reg. (N. S.) 472, 473; Sir Godfrey Lushington, Report of Royal Commission, 90.

[5] As to the constitutionality of a statute making it a criminal offense to make it a

If the application of Judge Holmes' view in Plant *v.* Woods can be confined (as we think it can and should be) to threatened "strikes" in support of the principle of unionism in the strikers' own trade, we should be inclined to favor Judge Holmes' view and hold the justification in Case 3 sufficient. But if courts are to hold that this view necessitates the further concession that members of a union in one trade may take such action in behalf of the principle of unionism in other trades, then we should prefer to reject Judge Holmes' view.

Of course, if such means (as in Case 3) can be resorted to in order to strengthen the prestige of unions and to promote the spread of unionism, it must be allowable to use similar means to weaken unions and to prevent their growth.[1] Non-unionists must have correlative rights as against unionists, and employers must be at liberty to form a combination not to employ unionists (to refuse employment to unionists).[2]

Case 4. B, a non-union carpenter, is making repairs on A's dwelling-house, under a contract terminable, at any moment, at the will of either party. Defendant, a union printer who is working in A's publishing establishment under a similar contract, tells A that he will quit A's employ unless A ceases to further employ B. Thereupon A ceases to employ B. Defendant was actuated by a desire to strengthen the general principle of unionism in all trades. B sues defendant.

Case 4 raises the question whether, in the absence of any ex-

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condition of the sale of goods that the purchaser shall not sell or deal in the goods of any person other than the seller, see Com. *v.* Strauss, 191 Mass. 545.

[1] Lord Shand, in Allen *v.* Flood, [1898] A. C. 1, 169; and *cf.* Knowlton, C. J., in Berry *v.* Donovan, 188 Mass. 353, 360.

[2] The bill pending in the British Parliament gives immunity to combinations of masters as well as combinations of men.

In Boyer *v.* Western Union Tel. Co., 124 Fed. Rep. 246, it was held that discharging men because members of unions, and keeping a blacklist of their names and the reason for discharge, was not unlawful. See also Willis *v.* Muscogee Mfg. Co., 120 Ga. 597. *Cf.* Bulcock *v.* St. Anne's, etc., Federation, 19 T. L. R. 27.

In People *v.* Marcus, 185 N. Y. 257, a statute prohibiting any person from making the employment of another conditional on the employee not joining or becoming a member of a labor organization was held unconstitutional.

Statutes making it unlawful to discharge an employee because he belongs to a labor organization have been held unconstitutional. State *v.* Kreutzberg, 114 Wis. 530; Gillespie *v.* People, 188 Ill. 176; State *v.* Julow, 129 Mo. 163; Coffeyville, etc., Co. *v.* Perry, 69 Kan. 297.

A statute relative to employment offices, which discriminated against employers in case of a lock-out or a strike, was held unconstitutional in Matthews *v.* People, 202 Ill. 389.

press agreement of alliance, the interest of men in one trade in the general principle of unionism is so great as to justify them in inflicting damage on persons whose conduct is hostile to unionism in another trade (*i. e.*, hostile to the interests of a union composed of men in another trade). Assuming that unionist printers may take certain measures in behalf of the principle of unionism in their own trade, can they adopt the same sort of measures in behalf of unionism among carpenters? Does the fact that they are all hand workers or wage earners create such a common interest as to bring certain measures within the limits of self-defense? [1]

Of course, if we repudiate the view of Chief Justice Holmes in Plant *v.* Woods, then, *a fortiori*, there is no justification in Case 4.

But if we adopt the Holmes view and concede that the men of one trade may take certain defensive measures to strengthen the principles of unionism in their own trade, then the question comes whether they may take similar measures to strengthen the principle of unionism in another trade. Does logical consistency require the extension of the Holmes view to the latter case; and if logic might so require, does expediency forbid?

We think that it should not be so extended.[2]

It may be urged that the difference between Cases 3 and 4 is only one of degree. But, as Judge Holmes has said, most differences, when nicely analyzed, are differences only of degree.[3] Here the differences of degree are very marked. The interest of the printer in the prosperity of the carpenter is much less than in that of men of his own trade; and the same is true, to a large extent, as to the success of unionism in the two trades.[4] On the other hand, the

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[1] "The cause of one laborer is the cause of all laborers. Organized labor must give to each of its members its collective force and influence, else they will fall, one by one, a sacrifice to the greed of their employers." Dissenting opinion of Caldwell, J., in Hopkins *v.* Oxley Stave Co., 83 Fed. Rep. 912, 935. The learned judge was here answering the objection that only one member of a labor combination was in the employ of the plaintiff company.

[2] If our conclusion is correct, the well-known case of National Protective Ass'n *v.* Cummings, 170 N. Y. 315, should have been decided for plaintiff. The defendants (walking delegates) threatened the employer that if he did not discharge the members of the plaintiff association, the defendants "would cause a general strike of all men of other trades employed on said buildings."

[3] Rideout *v.* Knox, 148 Mass. 368, 372. In Haddock *v.* Haddock, 201 U. S. 562, 631, the same learned judge said: "I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it."

[4] "Another objection to the sympathetic strike is the fact of its remoteness. The public may sympathize with oppressed tailors who are struggling for better condi-

exercise of the right claimed by men of all trades to take such an active part[1] in an economic conflict between the men of one particular trade and their employer would operate to the great disadvantage of the employer. Nor is this all. The effect would be harmful to the general public; and there is a "growing conception of the public as a distinct entity having rights."[2] If economic war on the part of all workmen in all trades can be declared whenever there is a controversy in any one trade, there must always be great uncertainty as to the completion of any business undertaking in any trade, and as to obtaining the necessaries of life. Undoubtedly there may be close questions as to where the line shall be drawn between certain occupations, to determine whether men pursuing them belong to the same trade or to different trades. But this is a difficulty only of fact, and does not furnish a reason for considering all trades as identical with each other. Whether pressmen and compositors belong to the same trade or not (whether they both belong to the printing trade or not), they certainly do not belong to the same trade as carpenters.

Case 5. Add to Case 4 the following statement:

The members of each trade have their separate unions; but these unions have in turn formed a federation of trades. By the agreement of federation, whenever the interest of any one of the allied trades is involved the interests of all shall be deemed to be involved, and the members of each trade are bound to take the same defensive measures which they might lawfully adopt if their own trade were the one especially affected.

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tions, but it will not sympathize with waiters, teamsters, bricklayers, or railroad employees, if by any chance they strike sympathetically with the garment workers. The public finds in the original quarrel no justification for the intervention of the new unions, and it fears that by means of sympathetic strikes a conflict originally limited in its scope may become extended so as needlessly to involve the entire labor world." Mitchell, Organized Labor, 303.

"... in any given state or territory there is a wide divergence and dissimilarity of interest between its miners and its locomotive engineers, its carpenters and its garment workers, its glass blowers and its waiters, its doctors and its farmers, its manufacturers and its newspaper writers, even though these various people live and work in the same city or on the same street." *Ibid.* 400.

To prevent misapprehension, it should be added that Mr. Mitchell believes that sympathetic strikes, though to be resorted to only in the most extreme cases, are sometimes justifiable. *Ibid.* 304.

[1] Men of other trades may use persuasion and argument, because these methods are not *primâ facie* actionable and require no justification. But if they exert economic pressure, "they have not sufficient interest in the result to justify their act, if their act requires justification."

[2] Prof. Bigelow, in Centralization and the Law, 7.

Assuming in Case 4 that the union printer would be liable in the absence of any alliance or federation among the different trades, does the formation of such an alliance as supposed in Case 5 render conduct lawful which would otherwise be unlawful? Will the law recognize, and as it were uphold, an artificial unity of interest, growing out of (created by) the defendant's own agreements *inter se?*

This inquiry must be answered in the negative.

The question is somewhat analogous to the point considered in Boutwell *v.* Marr[1] and Martell *v.* White.[2] In these cases members of a union had enforced a penalty against a fellow member for dealing with the plaintiff, and had thereby damaged the plaintiff's business. They set up the defense that the penalty was provided for by the rules of the union, to which all its members had agreed. But the court held that the initial agreement of a member that a penalty may be imposed upon him does not make the imposition of such a penalty a lawful mode of attack upon the business of a third person. If the agreement of the members cannot directly justify conduct otherwise unlawful, can their agreement indirectly justify it by creating an artificial interest to serve as a foundation for the exercise of self-defense? Does a combination enjoy greater immunity than an individual?

Case 6. Defendant, a union carpenter, is working for A, a builder, under a contract terminable, at any moment, at the will of either party. A is in the habit of buying his family meat from B, a butcher who employs non-union journeyman butchers. Defendant threatens to quit A's employ, unless A ceases to buy meat of B. Thereupon A ceases to buy meat of B. B sues defendant.

Case 7. Defendant, a union journeyman butcher, is working in A's meat market under a contract terminable, at any moment, at the will of either party. A is in the habit of selling meat to B, who employs non-union carpenters. Defendant threatens to quit A's employ unless A ceases to sell meat to B. Thereupon A ceases to sell meat to B. B sues defendant.

Even if there can be any question as to the invalidity of the justification in Case 4, it seems impossible to entertain any doubt as to Case 6 and Case 7. The condition here sought to be imposed is not that A shall himself refrain from employing non-union laborers. It is far more sweeping; namely, that A shall not have dealings with another person who employs non-unionists, even

[1] 71 Vt. 1. [2] 185 Mass. 255.

though (as in Case 6) such dealings have no relation to the particular work on which the defendant would be engaged. The benefit likely to result to the defendant is much less, and the probable damage to the employer and to the community is much greater, than in Case 3 or Case 4.

If a contrary view is adopted, what limit is there to the conditions which may be imposed with a view to causing damage to persons other than the offeree? What of a condition that the employer shall cease to subscribe towards the support of a certain clergyman, or that he shall not contribute to the campaign fund of a particular candidate, or that he shall not vote for such a candidate?[1]

Case 8. Defendant, a union bricklayer, is working for A, a builder, under a contract terminable, at any moment, at the will of either party. A is in the habit of buying bricks from B, who employs non-union brickmakers. Defendant threatens to quit A's employ unless A ceases to buy bricks of B. Thereupon A ceases to buy bricks of B. B sues defendant.

Case 9. Defendant, a union brickmaker, is working in A's brickyard under a contract terminable, at any moment, at the will of either party. A is in the habit of selling brick to B, an employer of non-union bricklayers. Defendant threatens to quit A's employ unless A ceases to sell brick to B. Thereupon A ceases to sell brick to B. B sues defendant.

Cases 8 and 9 both differ in one respect from Case 6. Like 6, they are attempts to regulate the employer's dealings with other persons who are not his employees. But, unlike 6, the dealings have some relation to the particular work on which the defendant would be engaged. One relates to the obtaining of the material on which the defendant is to work; the other relates to the disposition of the product manufactured by the defendant's labor. We think, however, that the justification is not good. The defendant does not simply exercise his right not to work. Such conduct might not need justification. But, instead, he is offering to refrain from exercising his right on condition that another person (A) will take action damaging to the plaintiff (B).[2] Such conduct is *primâ facie* actionable; and the attempted justification is not sufficient. The damage to B, and to the employer (A), and to the community would be excessive in proportion to the benefit to the

[1] Defendant threatens to "boycott" any one boarding, or selling necessaries to, any servant employed by plaintiff. The effect is to prevent plaintiff from obtaining help. Held, an action lies. Patch Mfg. Co. *v.* Protection Lodge, etc., 77 Vt. 294.

[2] See, more fully, *ante*, pp. 272-274; 358, 359.

defendant. B has a right that A should be left reasonably free to purchase of B or to sell to B.[1] The attempted condition imposes an undue restriction upon A's freedom in purchasing material and in selling finished product. It goes further than Case 3, where the attempted restriction relates to the class of persons employed by A himself in working up the material after he has purchased it. If we were right in the answer to Case 4, then *a fortiori* the above conclusion is correct. If the defendant is not justified, as against a third person, in imposing a condition as to who shall be hired by his employer in trades other than his (defendant's) own, then he cannot impose a condition as to who shall be engaged by outsiders with whom his employer has dealings.[2]

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[1] *Ante*, p. 260.

[2] Under Case 8, see Purvis *v.* Local, etc., 214 Pa. St. 348; also Purington *v.* Hinchliff, 219 Ill. 159.

Under Case 11, *post*, cases are cited where the defendant's conduct was similar to that in Case 8 or Case 9, but with the additional fact that the defendant also exerted "economic pressure" upon customers of A in order to induce such customers to exert in their turn similar pressure upon A. See, *e. g.*, Moores *v.* Bricklayers' Union, 23 Oh. Wkly. Bul. 48.

As to Case 9, Lyons *v.* Wilkins, [1896] 1 Ch. 811, is a very strong authority for plaintiff. In that case there was a strike against Lyons for the purpose of getting wages raised. Schoenthal was a manufacturer who employed workmen under him separately, but who did work at his own place of business as a "sub-manufacturer" for Lyons. The defendants, trade union officials, intimated to Schoenthal that if he went on working for Lyons they would call out his workmen; and the workmen were called out accordingly. (In Appendix II to the Report of the Royal Commission, p. 104, it is said that defendants ordered "a secondary strike" against Schoenthal.) This threat to call out Schoenthal's workmen was made, "not because they objected to the wages that he was giving them, not in order to make a strike of the workmen for the sake of those workmen as between them and their own employer, but for the express and direct purpose of preventing Schoenthal from working for Messrs. Lyons & Co., and of putting in this manner additional pressure upon Messrs. Lyons & Co. so as to induce them to come to the terms which they wished to establish between Messrs. Lyons & Co. and the workmen of Messrs. Lyons & Co." Kay, L. J., p. 829. "There was no dispute between Mr. Schoenthal and his men." What the union did "was to call out Mr. Schoenthal's men in order to prevent him from working for Messrs. Lyons, and thus to compel Mr. Schoenthal, who was willing to work for Messrs. Lyons, not to work for them, by depriving him of the men wherewith to work for Messrs. Lyons, and by this means to injure Messrs. Lyons in their trade, if they did not obey the edicts of the union." A. L. Smith, L. J., p. 834. The proceedings of the union were held unlawful.

If the conduct of the unionists in that case was unjustifiable, much more would it have been so if Schoenthal, instead of working on material owned by Lyons, had been working on his own material and afterwards selling the finished product to Lyons.

In State *v.* Van Pelt, 136 N. C. 633, it was held that defendant unionists were not criminally punishable for combining to damage an employer of non-unionists by notifying the public that the defendant unionists would not work on material purchased

Case 10. Unionists in a particular trade refuse to buy goods made by non-unionists in that trade, and give notice that they will so refuse. Such notice is given with intent, either to prevent retail merchants from purchasing such products of the manufacturer, or to induce the manufacturer to cease employing non-unionists. Suit is brought by manufacturer; or by non-unionist who has been dropped from employ of manufacturer without breach of contract.

Are the unionists justified?

Here "the power of the workingman as a consumer is enlisted in support of his demands as a producer." [1]

The relation of the unionists to the product, in case they purchased it and used it for their own purposes, would be more direct than in Case 8, where they would be connected with it only by working on it while the property of another. In Case 10 they would, if purchasers, become owners in their own right and consumers.[2] In Case 8 they would merely be working on it for the ultimate benefit of another. In Case 10 their interest is more directly served by their refusal than in 8; and the embarrassment and confusion resulting to the business relations of other parties would probably be less than in 8.

In Case 10 we incline to think them justified; but the decision of the majority of the court in Hopkins *v.* Oxley Stave Co. is opposed to this view.[3]

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from him. Connor, J., said, p. 658: "There is no complaint that the conduct of the defendants was intended to injure non-union men. This case has no such element in it, and we do not wish to be understood as expressing any opinion in regard to it. The question has been before other courts. There is a painful absence of harmony in the decisions."

[1] Mitchell, Organized Labor, 293.

[2] ". . . a product may be boycotted either by a refusal to buy it or a refusal to work on it or with it." Mitchell, Organized Labor, 287.

[3] In Hopkins *v.* Oxley Stave Co., 83 Fed. Rep. 912, affirming 72 Fed. Rep. 695, the Coopers' Union and labor unions in other trades induced the Oxley Company's customers to refrain from buying machine-hooped barrels of the Oxley Company, by threatening that labor unionists would refuse to buy commodities packed in such barrels. An injunction was granted, the literal terms of which are not stated. Caldwell, J., in his dissenting opinion, p. 933, says that the defendants "are enjoined from refusing to buy the barrels, and the commodities packed in the same." This would, of course, be going too far. Probably the main feature of the decree consisted in enjoining the defendants from inducing (or from combining to induce) the Oxley Company's customers not to buy the barrels by threatening that the defendants would refuse to buy commodities packed in the barrels. The majority of the court were probably influenced by the idea that combination was in itself an unlawful method; and also by the idea, pp. 918, 921, that a "conspiracy to compel a manufacturer to abandon the use of a valuable invention" is one to accomplish an unlawful end. If the Coopers' Union

Suppose that unionists of a particular trade do not merely abstain from buying goods manufactured by non-union laborers of another trade, but also give notice to retail merchants that they will refuse to buy; and suppose that such notice is given with the intention of preventing retail merchants from purchasing these goods of the manufacturer, or with the intention of preventing the manufacturer from continuing to employ non-unionists. Can the giving of this notice be justified? Does not this present the same question as where unionists of one trade give notice that they will refuse to work for a man who employs non-unionists in another trade? That question was considered under Case 4, *ante*, and the ground taken was that such notice is unjustifiable as against the non-unionists.

Case 11. Defendant is a union carpenter, working for A, a builder, under a contract terminable, at any moment, at the will of either party. A is in the habit of buying lumber from B, who also sells lumber to X, an employer of non-union carpenters. Defendant threatens to quit working for A unless A ceases to buy lumber of B. Thereupon A ceases to buy lumber of B. B sues defendant.

In Case 11 the interest of the defendant is even more remote than in Case 8 or Case 9. The defendant has no fault to find with the manner in which B manufactures his lumber or with the source from which he obtains the material. B is not a competitor, or rival, or antagonist, or employer of the union workmen; yet they are attempting to restrict his liberty in the matter of disposing of his property to whomsoever he wishes. There is no valid justification, as against B.

This is much like one branch of the case of Temperton *v.* Russell.[1]

Temperton is a dealer in building materials. Myers is a builder who refuses to conform to labor union rules in the conduct of his business. The union requests Temperton to cease selling material to Myers. Temperton refuses this request. Thereupon the union officials notify Brentano, another builder who is accustomed to buy materials of Temperton, that the union men will refuse to work upon any material purchased of Temperton. In consequence of this notice, Brentano ceases to purchase materials of Temperton, a result desired by the union.

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alone had made the threats, they would seem to have a sufficient interest to justify their conduct.

[1] [1893] 1 Q. B. 715.

Temperton sues the union officials for the loss of Brentano's custom. It is held that he can recover.[1]

"Have A and B, in the course of combined competition with C, the right to attack D, with whom they are not in direct competition, in order to effect the object of driving C out of the market? Will the object of competition, which has been held by the highest tribunal to justify combined injury to trader C, excuse an injury effected by combined action to trader D, who is not, as is trader C, in the position of a direct rival?"[2]

Here the unionists' only ground of complaint is because Temperton refused to be an instrument of vicarious attack on their part against Myers. If it is allowable for them to inflict damage upon Temperton for such a cause, they can next proceed to inflict similar damage on A because he refuses to cease dealing with Temperton, and then on B because he refuses to cease dealing with A, and so on to the end of the alphabet.

Whatever may be the dicta in Allen *v.* Flood, there is no inconsistency between the actual decision in that case and the result

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[1] For American authorities tending to sustain the result reached in Temperton *v.* Russell, and also tending to sustain the action in Case 12, *post*, see Loewe *v.* California, etc., Federation, 139 Fed. Rep. 71; Pickett *v.* Walsh, 78 N. E. Rep. 753 (Mass., 1906); March *v.* Bricklayers', etc., Union, 63 Atl. Rep. 291 (Conn., 1906); My Maryland Lodge *v.* Adt, 100 Md. 238; Beck *v.* Railway Teamsters, etc., 118 Mich. 497; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101; Casey *v.* Cincinnati Typographical Union, 45 Fed. Rep. 135; Matthews *v.* Shankland, 56 N. Y. Supp. 123; Moores *v.* Bricklayers' Union, 23 Oh. Wkly. L. Bul. 48; State *v.* Glidden, 55 Conn. 76; Crump *v.* Com., 84 Va. 927.

See also Purvis *v.* Local, etc., 214 Pa. St. 348.

The recent decision in Bender *v.* Local Union 118, 34 Wash. L. Rep. 574, is contrary to the above authorities.

In March *v.* Bricklayers' Union, *supra*, a union composed of bricklayers and plasterers voted to refuse to handle brick from any manufacturer delivering brick to boss masons employing non-union men. March, a manufacturer, sold brick to a boss mason employing non-union men. The union voted "to place damages of $100" against March. Afterwards March began delivering brick to a boss mason employing union men. The union demanded payment of the $100 under a threat that, unless payment was made, the men employed by the boss mason would refuse to handle the brick. Payment was made. It was held that March could recover back the payment; its exaction was an act of extortion in violation both of the Connecticut statute and of common law principles. Prentice, J., said, p. 293: "It is further said that the action of the defendants was justified in the exercise of the rights of fair trade competition. If it be assumed that these journeymen bricklayers and this brick manufacturer, whose business touched each other only in that the latter sold brick to persons for whom the former worked, are to be regarded as trade competitors, so that the recognized doctrines applicable to such competitors are applicable to them, it yet remains that the means resorted to in this case would not be permitted."

[2] Chalmers-Hunt, Trade Unions, 100.

reached in Temperton *v.* Russell. Even if the workmen in Allen *v.* Flood had themselves given notice of their conditional intention to leave, the case against them would have been weaker than that against the defendant in Case 11 :

(*a*) Because there the defendants would be exerting pressure only upon persons for whose custom they were in competition with the plaintiffs, namely, upon their employers.

(*b*) Because the mode of pressure on their employers consisted solely in threatening certain action on their own part, without inducing action on the part of outsiders.

It has sometimes been asserted, or implied, that the decision in Temperton *v.* Russell (as well as the decision in Quinn *v.* Leathem), denies to the laborer a right which is allowed to the trader; that a method of warfare is there held inadmissible in labor conflicts which has been adjudged lawful in trade competition.[1] The Mogul case is usually cited, and the Glasgow case probably will be cited, as a typical instance of methods of competition thus permitted to traders. But a careful comparison of the precise questions presented in the Mogul and Glasgow cases with those involved in the Temperton case will show that the objection is not well taken.

In the Mogul case[2] a number of ship owners formed a combination and offered specially favorable terms to shippers who would deal exclusively with vessels belonging to the combination. They offered local shippers a benefit by way of rebate if they would not deal with their rivals, the plaintiffs, but would deal exclusively with the combination. The rebate was to be forfeited if this condition was not fulfilled.[3]

In the Glasgow case[4] a more drastic measure was adopted; not merely offering more favorable terms to a party if he would deal

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[1] See 8 HARV. L. REV. 7 and 8; Lord Dunedin's note in Report of Royal Commission, 19; Nat. Rev. for March, 1906, pp. 65, 66; see also Professor Lewis' comparison of the "labor boycott cases with the trade boycott cases," 44 Am. L. Reg. (N. S.) 491–492, and 498.

[2] Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598; [1892] A. C. 25.

[3] The combination also refused to continue to employ as shipping agents persons who were also undertaking to act as shipping agents for their rivals. This refusal seems clearly justified on the grounds stated by Lord Watson and Lord Morris. The agents would be filling "an irreconcilable position in being agents for the two rivals . . . " See [1892] A. C. 43, 50; also Lord Dunedin's note in Report of Royal Commission, 19. *Cf.* Prof. Lewis, 44 Am. L. Reg. (N. S.) 498, 499.

[4] Scottish Co-operative Wholesale Society, Ltd. *v.* Glasgow Fleshers' Trade Defense Association, 35 Scot. L. Rep. 645.

exclusively with defendants; but declining to deal at all, as to the business in hand, with a party who dealt, as to that business, with the defendants' competitors. American cattle were sold at only one place in Scotland; the sale there being by auction. Among the principal probable purchasers were on the one hand certain co-operative societies, and on the other hand an association of butchers who were competing with the co-operative societies in the retail sale of meat. The butchers notified the cattle salesmen that they would not buy at their auction sales, unless the salesmen declined to sell to the co-operative stores. The cattle salesmen yielded to this pressure, and intimated in their conditions of sale that they would not accept the bids of persons connected with the co-operative stores; the result being that the co-operative societies were cut out of the foreign meat market.

In both the Mogul and the Glasgow cases it was held that the methods of competition adopted did not give a cause of action.[1]

The pressure in the Temperton case goes beyond that in the Glasgow case, both as regards the number and character of the persons attempted to be influenced, and also as to the subject-matter in respect to which the influence was exerted. In the Glasgow case the only party attempted to be influenced was the party carrying on the business in respect to which the plaintiffs and defendants were in competition. And the threat of refusing to deal with that party in case he should deal with the defendants' rivals was limited to the exact subject-matter of rivalry, to dealing in the precise thing concerning which the competition existed.

If the union workmen in the Temperton case had said to Myers, "We shall cease to work for you unless you cease to employ non-unionists," such a threat might have been justified on the analogy of the Glasgow case or the Mogul case. But instead of this, they in effect said to Brentano, "We shall cease to work for you, unless you cease dealing with Temperton, who sees fit (or, so long as he sees fit) to disregard our request that he will cease dealing with Myers."

In the Temperton case, instead of exerting pressure solely upon Myers, the party with whom the unionists are in controversy, the unionists exert pressure upon Brentano, either to induce Brentano to exert pressure upon Temperton for the purpose of inducing Temperton to take action damaging to Myers, or to induce

[1] See comments in 18 L. Quar. Rev. 4 and 5.

Brentano to punish Temperton for refusing to take such action. In other words, the defendants successively attack, or threaten to attack, two outside parties to compel them to take part in the war or to be punished for remaining neutral. And the subject-matter in reference to which non-intercourse is threatened is, in neither instance, the same as that in controversy between the unionists and Myers.

In the Mogul case the defendants did not say, "If any merchant ships goods by the rival lines, we shall refuse to ship goods for any man who is a customer at that merchant's retail store"; nor did they say, "If any merchant ships goods by the rival lines, we shall refuse to have any dealings on any subject whatever with any man who is a customer at that merchant's retail store." In the Glasgow case the defendants did not say to the salesmen of the foreign cattle, "If you sell cattle to the co-operative societies, we shall refuse to sell meat to any landlord who rents you a stock-yard or a tenement." The distinction between the Temperton case on the one hand and the Glasgow and Mogul cases on the other hand is well illustrated by a very recent case raising two distinct questions, one of which was decided in favor of the defendants and the other in favor of the plaintiff. This is the case of Pickett *v.* Walsh, decided in the Supreme Court of Massachusetts, October 16, 1906.[1]

The plaintiffs were brick and stone "pointers." The defendants were officers and members of bricklayers' unions and stone-masons' unions.

One ground of complaint was that the defendants prevented the employment of the plaintiffs as "pointers" by notifying contractors that they would not lay the bricks or do the mason work on any building unless they were also employed to do the pointing of the brick and stone masonry. "The defendants in effect say we want the work of pointing the brick and stone laid by us, and you must give us all or none of the work."[2] The court held that this conduct, although disastrous to the plaintiffs and damaging to the building contractors, was justifiable. ". . . it was within the rights of these unions to compete for the work of doing the pointing, and, in the exercise of their right of competition, to refuse to lay bricks and set stone unless they were given the work of pointing them when laid."[3]

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[1] 78 N. E. Rep. 753; 34 Banker and Tradesman 2414.

[2] Loring, J., p. 758.

[3] Loring, J., p. 758.

The other ground of action in Pickett *v.* Walsh was quite distinct from the foregoing. The firm of L. P. Soule & Son Company were the general contractors for the erection of the Ford building; but they had nothing to do with the employment of "pointers." The pointing of that building was being done under a contract between the owners of the building and Pickett, a pointer who was one of the plaintiffs. Other buildings were being erected for other owners, on which the Soule Company were the general contractors, and as to which no complaint existed in reference to the pointing. The bricklaying and masonry on these other buildings were being done by members of the defendants' union. The defendant officials induced all the bricklayers and masons to quit working for the Soule Company on these other buildings, because that company "was doing work on another building [the Ford building] in which work was being done by pointers, employed not by the L. P. Soule & Son Company but [by] the owners of the building." The evident purpose was to thus induce the Soule Company to exert pressure on the owners of the Ford building to discontinue the employment of the pointers (Pickett *et als.*). The court held that this conduct was not justifiable. The decision is not based on the ground that the defendants were intentionally inducing, or attempting to induce, a breach of contract; but on the broad ground that the forcing a neutral third person to exert a pressure on the plaintiff's employer was not a lawful means of competition. Loring, J., said:[1]

"That strike has an element in it like that in a sympathetic strike, in a boycott, and in a blacklisting, namely: It is a refusal to work for A, with whom the strikers have no dispute, for the purpose of forcing A to force B to yield to the strikers' demands. In the case at bar the strike on the L. P. Soule & Son Company was a strike on that contractor to force it to force the owner of the Ford building to give the work of pointing to the defendant unions. That passes beyond a case of competition where the owner of the Ford building is left to choose between the two competitors. Such a strike is in effect compelling the L. P. Soule & Son Company to join in a boycott on the owner of the Ford building. It is a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant union's) favor. Such a strike is not a justifiable interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organized labor's right of

[1] P. 760.

coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute; or to put it in another way, we are of the opinion that a strike on A, with whom the striker has no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best."

Without going through all the American decisions tending in the same direction as the Mogul and Glasgow cases,[1] we may take as a typical case Bohn Mfg. Co. *v.* Hollis.[2] "A large number of retail lumber dealers formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers not dealers, at any point where a member of the association was carrying on a retail yard; and they provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, the secretary should notify all the members of the fact. The plaintiff, a wholesaler, having made such a sale directly to a consumer, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association."[3] The court refused to grant an injunction against sending out the notice. Here the retail dealers did not threaten to cease dealing with any one except their competitors, *i. e.*, wholesale dealers who should attempt to sell directly to consumers. They used no lever but their own conduct. They did not threaten to induce outsiders to refrain from working for, or selling goods to, the wholesalers. And even as to their own conduct, they did not threaten to abstain from dealings with wholesalers in all matters, but only in the purchase of lumber. Much less did they threaten to abstain from dealing with persons who dealt with the wholesalers. In a subsequent Minnesota case Start, J., said:[4]

"It is to be noted that the defendants in the Bohn case had similar legitimate interests to protect which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers; and that the defendants' efforts to induce parties not to deal with offending wholesale

[1] As previously intimated, there are some American authorities *contra* to the principle of the Glasgow case, and inconsistent with some of the reasoning in the Mogul case. See, for instance, Jackson *v.* Stanfield, 137 Ind. 592; Brown *v.* Jacobs Pharmacy Co., 115 Ga. 429; and other cases collected by Prof. Wyman, 17 Green Bag 210, 222.

[2] 54 Minn. 223.

[3] This statement is copied from 17 Green Bag 218. See also statement by Prof. Lewis, 44 Am. L. Reg. (N. S.) 469.

[4] Ertz *v.* Produce Exchange Co., 79 Minn. 140, 144.

dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealers." [1]

In the prominent case of Leathem *v.* Craig,[2] if it be conceded that the defendants might have been justified in withdrawing union men from Leathem's employ, *non constat* that they could lawfully threaten to withdraw union men from the employ of Munce, for the purpose of compelling Munce to withdraw his custom from Leathem.[3] In their "war" with Leathem they had no right to augment their army by this process of conscription. Munce was a stranger to the conflict and wished to remain a neutral. Professor Dicey says:

"Even in real warfare, some slight respect is paid to rights of neutrals, and if a strike can — by a delusive figure of speech — be termed a battle between masters and men, each of the public is a neutral, who is entitled to demand that his legal rights shall be respected by both parties to the conflict." [4]

"It was attempted," say the Commissioners on the Anthracite Coal Strike, "to defend the boycott, by calling the contest between employers and employees a war between capital and labor, and pursuing the analogies of the word, to justify thereby the cruelty and

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[1] Another American case, reaching a result similar to that in the Bohn case, and, like that case, clearly distinguishable from the Temperton case, is Macauley *v.* Tierney, 19 R. I. 255.

[2] Ireland [1899] 2 Q. B. & Ex. D. 667; s. c. in House of Lords, *sub nomine* Quinn *v.* Leathem, [1901] A. C. 495.

[3] In Booth *v.* Burgess, 65 Atl. Rep. 226, 237 (N. J., Nov. 22, 1906), Stevenson, V. C., takes the ground that if the union workmen of Munce had voluntarily combined to give notice of their intention to quit Munce's employ unless Munce ceased buying meat of Leathem, they would not have been liable to Leathem for the loss of Munce's custom. It is clear that this very able judge would disagree with the views we have heretofore expressed (*ante*, 272–274, 358, 359) as to conditional notices or threats. He sustains the result in Quinn *v.* Leathem on the ground (pp. 232, 233, 237) that the union officials proposed to coerce Munce's union workmen by threats of fine or expulsion. In the course of his opinion the learned judge acutely criticizes the common use of the term "justification," though he admits that "the use of such phraseology is certainly sustained by abundant analogies." See 65 Atl. Rep., at 229, 233, 228.]

See also another late New Jersey case, decided in the Court of Errors, Nov. 19, 1906, Brennan *v.* United Hatters, 65 Atl. Rep. 165, where Pitney, J., says, p. 171: "It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former."

[4] Nat. Rev., Oct., 1906, p. 217.

illegality of conduct on the part of those conducting a strike. The analogy is not apt, and the argument founded upon it is fallacious. . . . War between citizens is not to be tolerated, and cannot in the proper sense exist. . . . The practices, which we are condemning, would be outside the pale of civilized war."[1]

In using his real estate, the owner, X, may with impunity do some things on his own land which he knows will result in damage to his neighbor B; and by the weight of English and American authority he is not held liable, even though he was actuated by ill will to B. But suppose that X threatens his neighbor A that he will do something on X's land which will damage A, unless A will make a use of A's land which will damage B; and that A, influenced by this threat, thereupon uses his own land in such a way as to damage B. Would it be held that X's right (although sometimes spoken of as an "absolute right") to make a certain use of his own land justified him in thus coercing A to make a certain use of A's land and thus produce damage to B? The gist of the complaint against X is not that he exercised against B a right which he (X) possessed. It is that he caused another person (A) to exercise a right which that other person possessed. The right of user of real estate has been said to be a right of the most highly privileged kind, but it could hardly be stretched to cover such a case as has just been supposed.

Case 12. Union carpenters, whom a builder employs by the day, notify the builder that they will leave at the close of the day unless he notifies A, a grocer, that he (the builder) will stop buying groceries of A, unless A ceases to employ B, a non-union clerk, whom A hires by the day. The builder gives the notice, and thereupon A ceases to employ B. B sues the union carpenters.[2]

Here the defendants do not use only their own conduct as a lever and therewith operate directly upon the employer of B. They use their own right (to work or not to work) as a temporal inducement to influence their own employer to exert pressure, by temporal inducement, in his turn upon the employer of the plaintiff, B. The builder is an outsider, so far as concerns either the relation between the grocer and his clerk or the conflict between allied unions and the employers of non-unionists. The defendants, by temporal inducement, have forced an outsider, who would otherwise have remained neutral, to take part in the conflict.

[1] Report, 78.

[2] See authorities cited *ante*, p. 442, n. 1.

In some of the cases previously considered the defendant influences the conduct of only one person. The only means or lever used to influence that person is a threat as to the future conduct of the defendant himself, a threat of loss which would result to that person from the conduct of the defendant alone.

In Case 12 the defendant influences the conduct of two other persons, one of whom is an entire stranger to the controversy; and he uses the second to influence the first. If he can do this, then he can influence a third person to influence the second; or influence an indefinite number in succession to influence each other in turn. He can drag the whole community into his dispute.[1]

Case 13. A employs a non-unionist carpenter, B, whom he hires by the day. He refuses to drop B at the request of the unionists. A owns a tenement house, occupied by C, a tenant at will. D, a baker, is in the habit of selling bread to C. The unionists notify D that they will call out his unionist journeymen bakers, and will cease to buy bread of him, unless he (D) notifies C that he shall cease to sell C bread so long as C occupies a tenement of A's. D gives such notice to C, and C, in consequence, moves out of A's house. The unionists also give public notice that, if A does not drop B, they not only will refuse to work for A, but will not work for, or buy from, any one who has any dealings of any kind with A, nor have

[1] Mr. Mitchell apparently believes in the legality of the "secondary boycott," though deploring "that the boycott occasionally is used tyrannously and unfairly, and not infrequently is carried too far."

His views are in part as follows:

"To boycott a street railway which overworks its employees and pays starvation wages is one thing; to boycott merchants who ride in the cars of the company is another thing, and to boycott people who patronize the stores of the merchants who ride in boycotted cars is still another and a very different thing. As a general rule, the further the boycott is removed from the original offender, the less effective it becomes. It should be the aim of the union to seek, and not to force, the alliance of the public, and to render the boycott as direct and personal as possible. There are many cases, however, where a secondary boycott is absolutely necessary. When a union is engaged in a contest with a newspaper, especially, as is usually the case, with a newspaper not largely read by the working classes, a secondary boycott is far more effective than a direct boycott. A newspaper can better do without a few hundred two-cent subscribers than without a few thousand-dollar advertisements; and a man who continues to pay large sums in advertising to a newspaper that is maltreating its employees may not unfairly be considered the ally of the journal, and as aiding and abetting it in its contest with labor. Especial care, however, should be used in the laying of a secondary boycott." Mitchell, Organized Labor, 289–290.

The successful working of Mr. Mitchell's scheme of boycotting a newspaper, by threatening to withdraw business patronage from merchants who advertise in it, has been held actionable. Casey *v.* Cincinnati Typographical Union, 45 Fed. Rep. 135; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101; Matthews *v.* Shankland, 56 N. Y. Supp. 123. *Cf.* 44 Am. L. Reg. (N. S.) 489, 490.

any dealings with any one who deals with any person who has any dealings with A.[1]

The result is that A is cut off from all business dealings, cannot induce any one to sell him provisions, and suffers the pangs of starvation, as the unionists intended that he should. A sues the union officials.

This is an application of the principle of some of the preceding cases carried out to an extreme. Such methods clearly exceed the legitimate bounds of competition or of economic warfare. It is impossible to justify them by the analogy of the Mogul and Glasgow cases.

The remaining question is: Whether bad motive operates as a rebuttal of an otherwise sufficient justification?

Will "a *primâ facie* justification" on the ground of competition (defense of one's own interest) be rebutted by proof of bad motive on the defendant's part? Is an act "apparently within the domain of competition" unjustifiable if the actor's ultimate motive was, not to benefit himself, but to gratify a personal grudge against the plaintiff?

In discussing this question the terms "motive" and "intent" are used in the significations previously indicated on pages 256 and 259, *ante*. Intent is used to denote the immediate object aimed at by the doer of an act, the immediate result desired by the actor. Motive is used, not to signify the object or result immediately aimed at, but to denote the reason for aiming at that object; not to indicate the result immediately desired, but the cause for entertaining that desire, the feeling which makes the actor desire to attain that result. And we here restate[2] two propositions: (1) Bad motive is not generally a requisite element in making out a *primâ facie* tort;[3] (2) Good motive does not alone

[1] For examples of "secondary boycotts," see Report of Anthracite Coal Strike Commission, 77. See also statement of general objections to "what is popularly known as the boycott." *Ibid.*, 76–78.

[2] From p. 259, *ante*.

[3] That an act otherwise lawful does not become actionable by proceeding from a bad motive is a proposition strongly sustained by the opinions of several of the Law Lords in Allen *v.* Flood, [1898] A. C. 1. See also Lord Lindley, in Quinn *v.* Leathem, [1901] A. C. 495, 533.

For a view giving more effect to bad motive, see the elaborate discussion by Prof. Ames in 18 HARV. L. REV. 411: "How far an Act may be a Tort because of the Wrongful Motive of the Actor."

See Prof. Lewis, in 5 Colum. L. Rev. 107–123; and *cf.* the majority opinion in Plant

and of itself constitute a justification for the intentional infliction of harm.

To consider now the effect of defendant's bad motive as a rebuttal of his justification:

First: It is obvious that the question cannot arise where there is no justification made out, and hence there is nothing for the plaintiff to rebut. The inquiry whether bad motive on the defendant's part does or does not exist is immaterial if we have a case where there is a *primâ facie* cause of action and the defendant has not shown an apparently sufficient justification. The plaintiff, having already made out a *primâ facie* cause of action, has no occasion to strengthen his case by proving bad motive (unless he claims exemplary damages). Nor can the defendant justify himself by simply proving good motive. Whatever else may be a justification, absence of bad motive *per se* is not. In some cases where the court or counsel have laid stress on bad motive, we think it will be found that the true *ratio decidendi* consists in the absence of justifying circumstances rather than in the presence of bad motive.[1]

Second: Bad motive, in the true sense, seldom exists in this class of cases; *i. e.*, as between persons who are, to outward appearance, competitors in trade or labor disputes. The existence of bad motive may sometimes be admitted by filing a demurrer to a declaration; but if the defendant had traversed, instead of demurring, the plaintiff would hardly ever have been able to prove the alleged bad motive. Again it may sometimes be claimed that the existence of bad motive has been found as a fact by the jury; either by necessary implication from a general verdict or by specific findings. But in most of these cases the jury were acting

v. Woods, 176 Mass. 492. The subject of controversy is stated by some judges in a question-begging form. It is stated very clearly by Hammond, J., in 176 Mass., at 499–500.

As to the reason for the acknowledged materiality of motive as a requisite to an action for malicious prosecution, see the explanation of Lord Herschell, in Allen *v.* Flood, at 125, 126; and *cf.* Lord Watson, at 93.

[1] See, for instance, Webb *v.* Drake, 52 La. Ann. 290; Graham *v.* St. Charles St. Ry. Co., 47 La. Ann. 214, 1657. *Cf.* Ertz *v.* Produce Exchange Co., 79 Minn. 140, where the complaint demurred to "does not show that the defendants had any legitimate interest to protect."

Of course, cases which regard bad motive as an element in making out a *primâ facie* tort may fairly be cited to support the doctrine that a *primâ facie* justification may be rebutted by proof of bad motive. But this precise question was not before the court in the cases where the court held, or a demurrer admitted, that there was no justification. See Plant *v.* Woods, 176 Mass. 492, and Moran *v.* Dunphy, 177 Mass. 485.

under instructions which did not properly discriminate between motive and intent. The defendant frequently intends immediate harm to the plaintiff, but generally as a means of attaining the end of benefiting himself. In ninety-nine labor cases out of a hundred the defendant's motive (or, in other words, his ultimate intent) is to promote his own advantage. "As a rule, the ultimate object of a labor union in excluding an employee from work by pressure upon the employer, or in injuring the business of an employer by the persuasive or coercive boycott, is not the damage to their victim, but the advancement of the cause of labor. This motive, of course, is commendable. In the great majority of labor cases, therefore, the question whether the members of a labor union are guilty of a tort is a question, not of motive, but of the legal validity of the means adopted for effectuating their motive; and this question must be answered by a careful weighing of considerations of public policy."[1]

The question, then, whether, in a case of apparent self-interest, proof of bad motive will destroy an otherwise good justification, is generally speculative rather than practical.

Third: Assuming, however, that the existence of bad motive, though extremely rare, is not an absolute impossibility, what effect shall be given to it? Shall the plaintiff be permitted by the court to prove the existence of bad motive in order to overthrow an otherwise sufficient justification, grounded on self-interest?

It is obvious that permitting the plaintiff to raise this issue would very materially diminish the value of defendant's right of self-defense, his right to justify on the ground of self-interest. The allegation of bad motive is easily made, and the contention would prolong litigation and, if tried, might involve great expense.

It will be urged that conduct actuated by wrong motive deserves no protection and ought always to be subject to a civil remedy. This mode of stating the question assumes the existence of the wrong motive. If by any process of demonstration, free from the defects of human judgment, the existence of the bad motive could be established beyond all doubt, there might be more ground for contending that the law should give damages to the plaintiff. But this is not the state of things under which this question of law has to be determined. Whether the motive was in fact bad is, and

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[1] Prof. Ames, in 18 HARV. L. REV. 418, n. 3. *Cf.* Judge Holmes, in 8 HARV. L. REV. 8.

always will be, an open question, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such a question to the judgment of a jury.[1]

If the issue of bad motive can be thus raised in labor conflicts, it must also be allowed in cases of ordinary trade competition, a very wide field. We think that the rarely occurring punishment of a personal enemy, who has masked his hostility under the guise of competition, would not offset the harm caused honest competitors by their being compelled to litigate the question of the fairness of their motives whenever assailed by a disappointed rival.

Leaving out of view the instances of absolute privilege in defamation, there are opposing analogies (neither of them perfect) on which each side respectively will rely.

On the one hand, conditional privilege in defamation cases may be rebutted by showing that defendant acted from a wrong motive. This analogy is relied on by Sir William Erle as to labor conflicts,[2] but seems to be deemed inapplicable by Lord Herschell.[3] The law of defamation is "a law of absolute responsibility qualified by absolute exceptions."[4]

On the other hand, ordinary user of real estate does not, by the weight of English and American authority,[5] make the owner liable, even though he is actuated by the motive of personal ill will to the plaintiff.

We prefer to adopt the view that a defendant has, in this respect, the same immunity in exercising his right to work or to trade that he has in exercising his right to make use of his land. Neither of the rights is absolute, being limited by the correlative rights of others. But neither of them depends on the motive which induced their exercise.

If a defendant, in the alleged exercise of his right to use his land,

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[1] These views are, in large part, a reproduction of the language used by Lord Penzance in reference to another topic. See Dawkins *v.* Lord Rokeby, L. R. 7 H. L. 744, 755, 756. *Cf.* 2 Stephen, Hist. Crim. Law, 121.

[2] Erle, Trade Unions, 23.

[3] See Lord Herschell in Allen *v.* Flood, [1898] A. C. 1, 125, 126; Lord Watson, at 93.

[4] Pollock, Torts, 7 ed., 542, n. *x*.

[5] For French and German law to the contrary, see 2 Journal of Society of Comparative Legislation (N. S.) 453, 454, 460; Prof. Ames' note in 1 Ames & Smith, Cas. on Torts, 750, n. 1; German Civil Code, § 226.

or his right to work at his trade, intentionally causes damage to his neighbor, the question arises whether his right (assuming no bad motive for its exercise) justifies him in inflicting the damage. If that question is answered in the negative, there is then no occasion to consider what effect the presence of bad motive would have. He is liable irrespective of motive. If the above question is answered in the affirmative, then there arises the point we have been discussing; namely, whether the presence of bad motive would destroy his otherwise sufficient justification. Our impression is that it should not have that effect.

Jeremiah Smith.